

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 26, 2006 Session

STATE OF TENNESSEE v. LARRY BOYKIN

**Direct Appeal from the Circuit Court for Cocke County
No. 9048 Ben W. Hooper, II, Judge**

No. E2005-01582-CCA-R3-CD - Filed March 20, 2007

The appellant, Larry Boykin, was convicted by a jury in the Cocke County Circuit Court of first degree murder, and he received a sentence of life imprisonment in the Tennessee Department of Correction. On appeal, the appellant argues that the State failed to timely disclose exculpatory information, the trial court erred in failing to suppress the appellant's statements to police due to a Miranda violation, the trial court erred in allowing evidence of a burglary to be introduced during the course of the murder trial, and the evidence is insufficient to sustain his conviction for murder. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and J.C. McLIN, JJ., joined.

Keith E. Haas, Newport, Tennessee, for the appellant, Larry Boykin.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer Bledsoe, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and James B. Dunn and Tracy L. Stone, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In March 2003, a Cocke County Grand Jury returned an indictment against the appellant charging him with the first degree murder of Clayton Howard Housand, Jr., also known as C.J. The State's proof at trial revealed that the seventeen-year-old victim was staying with relatives in Newport at the time of his death. The victim's mother, Mary Apodaca, testified that on October 31, 2002, the victim and his best friend, Robert Sugden, traveled from Apodaca's home in Chesapeake, Virginia, to Newport to visit the victim's cousin, Grace Chapman. Although the victim did not have Apodaca's permission to travel, she allowed him to stay with Chapman for a while because she was

family. Apodaca maintained daily telephone contact with the victim while he was in Newport, the last contact being Tuesday, November 19, 2002. During their conversations, the victim told Apodaca that he had a girlfriend named "Patti" who was twenty-seven years old and had three children. He said that Patti needed a place to live, and he wanted to bring her to Virginia to live with him.

Near the time of their last conversation, the victim expressed to Apodaca a desire to come home to Virginia. He said that Sugden would not bring him home. Apodaca testified that her uncle, Danny Manuel, had traveled to Newport on Wednesday, November 20, 2002, and the victim had planned to ride home to Virginia with him. On Wednesday, Apodaca called her aunt, Betty Loveday, with whom Manuel was staying. Apodaca asked what time Manuel and the victim had left Newport, and she was informed that the victim was missing or had run away. Apodaca came to Newport on Saturday, November 23, 2002, and filed a missing person report.

Robert Caldwell, Chief Detective of the Cocke County Sheriff's Department, testified that on November 26, 2002, he spoke with the appellant to inquire as to the victim's whereabouts. The appellant told Detective Caldwell that he last saw the victim on the afternoon of Wednesday, November 20, 2002, when the victim was walking near Food City West. The victim told the appellant that his uncle, Manuel, was going to drive him home to Virginia. The appellant told Detective Caldwell that he knew that the victim "had broken into Sean Worboys' house and he was afraid he would go to jail."

Detective Caldwell spoke with the appellant again on December 2, 2002. During this conversation, the appellant did not disclose any knowledge of the victim's whereabouts. However, the appellant told Detective Caldwell that the victim burglarized Worboys' house and that he helped the victim sell the long guns stolen from the residence. The appellant noted that the victim kept the pistol he stole from the residence.

On December 7, 2002, Kenny Loveday, Apodaca's cousin, found the victim in a cedar thicket behind a bowling alley and a gas station. The victim was lying on blankets, and his face was covered in blood. Loveday deduced that the victim was dead. Loveday called 911 and waited at the scene for police to arrive. Loveday noted that in the frost near the body he saw footprints leading in and out of the thicket.

Loveday recalled that the victim, Sugden, and the appellant had been working construction for him at the time of the victim's disappearance. After the victim disappeared, the appellant and Sugden continued to work sporadically for Loveday. Loveday testified that when he asked the appellant and Sugden regarding the victim's whereabouts, they responded that the victim was "just around."

Shortly after the victim's body was found, Detective Caldwell and Tennessee Bureau of Investigation Agent Albert Ross McCall, II, were called to the scene. Detective Caldwell noted that the weather had been cold. He observed that the top blankets covering the victim's body appeared

to be frozen. There was dried blood on the victim's face, his jacket, the blankets, and the ground on the right side of the body. Although no weapon was found at the scene, police later found a .22 caliber, nine-shot pistol in a drainage ditch off of Clevenger Cutoff Road. The gun was found approximately one mile from the body, and three-tenths of a mile from Grace Chapman's trailer where the appellant was staying. There were no bullets in the gun when it was recovered. The thicket where the body was found was located a mile or less from Chapman's residence, and the ditch where the gun was found was on the route from Chapman's trailer to the location of the body. Detective Caldwell conceded that there was no physical evidence tying the appellant to the scene where the victim's body was found.

Agent McCall testified at trial that he interviewed the appellant on December 8, 2002. Agent McCall stated that the appellant showed no remorse when he was informed that the victim was dead and did not ask the questions typically asked by someone who has been informed of a friend's death, such as how, when, or by whom he was killed. Agent McCall stated that police discovered that on December 6, 2002, the appellant had pawned a JVC camcorder and camcorder accessories at Dixie Pawn Shop in Jefferson City.

At trial, Ellory Sean Worboys testified that on November 19, 2002, his residence was burglarized. Among the items taken were three long guns, one handgun, a JVC camcorder and camcorder accessories, "hunting stuff," a man's watch, and a collection of bicentennial quarters. Worboys identified the pistol that police found in the drainage ditch as being the one stolen from his residence. Worboys testified that during the burglary no ammunition was taken; however, the nine-shot pistol had been loaded with eight copper-painted lead bullets. Worboys also identified the JVC camcorder and camcorder accessories that were pawned by the appellant as being items taken during the burglary. Worboys said that at the time of the burglary, he was married to Patti Rogers, but they were in the process of divorcing. Worboys knew the appellant and had heard of the victim. Worboys knew that the appellant and the victim were friends of Rogers. Worboys stated that he suspected that the appellant and possibly the victim were involved in the burglary of his residence. He acknowledged that he could have threatened them in anger but insisted that he would not have killed them.

Dr. Darinka Miluesnic-Polchan, the medical examiner who performed the victim's autopsy, testified that the victim died as a result of four gunshot wounds. Two of the gunshot wounds were near contact wounds, meaning the muzzle of the gun was close to the skin at the time the gun was discharged. The other two wounds had the appearance of contact wounds, but, due to the decomposition of the body, she was unable to definitively determine if they were. The bullet from gunshot wound one entered in front of the victim's left ear and traveled in a more or less straight trajectory to exit in front of the right ear. This wound caused the victim to aspirate and drown in his own blood. The bullet from gunshot wound two entered the left upper neck area and traveled left to right, upward, and slightly front to back to lodge in the right temporal region close to the top of the victim's head. The bullet from gunshot wound three entered the top of the head to the right of the midline and traveled under the scalp, exiting the top of the head without going through bone. The bullet from gunshot wound four entered the back of the head, perforated bone, damaged the

brain, and lodged deep in the brain. The two bullets which were recovered from the body were copper-coated lead bullets consistent with the type that were in the pistol stolen from Worboys' residence. Further, the bullets demonstrated characteristics consistent with being fired from the type of gun owned by Worboys.

Clifton Ray Gray testified that after the victim's body was found, the appellant told him that the appellant's sister's boyfriend had found a body that had been shot four times. The appellant specifically mentioned that the body had been shot three times in the head and once in the jaw.

Dinah Mayes testified that she spoke with the appellant in November 2002. The appellant told Mayes that he and the victim "had a falling out" because the victim had stolen some guns, and the appellant helped the victim get rid of the guns. The appellant said he would be in trouble if he were caught with the guns. About a week after that conversation, Mayes again spoke with the appellant. The appellant told Mayes that he shot the victim, explaining that "he had to [shoot] him, he didn't have no other option because he would have to spend a lot of time in prison if [the victim] had turned his self in. He wanted to turn his self in. And said that [the victim] wasn't the only thing involved and the guns." The appellant said that he shot the victim four times, pointing "twice in the top of the head, once in the ear, [and] once in the neck." The appellant said that he used the pistol he and the victim stole from Worboys. The appellant told Mayes that he wiped his fingerprints from the gun before throwing it into a "water drainage" near Chapman's residence. The appellant said he showed the gun to Chapman, Sugden, Chandra Payne, and Rogers, and Payne "smelled of it where it had been fired." The appellant maintained that when he shot the victim "it was supposed to look like a suicide and he didn't die so he kept shooting him because . . . he wouldn't stop breathing." The appellant told Mayes that he, Chapman, and Sugden put the body in the back of Chapman's car and took it to a wooded area behind the bowling alley.

Patti Rogers testified that at the time of the victim's disappearance, she was in the process of divorcing Worboys. She and Worboys were not living together, and she denied having a relationship with the victim. Rogers recalled a conversation that took place at Chapman's residence before the victim disappeared. During the conversation, the appellant stated that he was "afraid that [the victim] was going to tell where they had broke into Sean Worboys' house and that they were going to have to do something." Chapman and Rogers suggested sending the victim back to Virginia. The appellant was concerned that the victim "was going to narc on them," so "they needed to get rid of him." After the victim disappeared, the appellant told Rogers "it was one of two things, either he shot him and he pointed at the top of his head, behind his ear and then to his chin, or he gave him the money to go back home to Virginia." The appellant also said that the victim would not be able to call anyone because the appellant had shot him, and when he shot him, the victim begged the appellant to help him. The appellant told Rogers that after the shooting he put the gun in a drainpipe. The appellant told Rogers "that he was going to put [the victim] in a ditch and burn him so there would be no evidence."

Before the burglary on November 19, Rogers heard the victim say he wanted to return home to Virginia. A couple of days after the burglary, Rogers saw the victim at Chapman's mobile home.

A few days after that, Rogers saw Chapman getting some things together to take to the victim and the appellant.

Rogers testified that Worboys had suspected that the appellant and the victim burglarized his residence. Worboys told Rogers that “if he found them that he would blow their brains out for stealing his stuff.” Worboys did not show remorse when he discovered the victim had been killed; in fact, he remarked that the victim “got what he deserved.”

Roger “Buck” Jones testified that one night in December before the victim’s body was discovered, the appellant and Brian Herndon were at his residence. The men were looking at a newspaper article about the victim’s disappearance. The appellant remarked, “With no evidence they have no case.” The appellant looked at the victim’s picture in the newspaper and smiled, displaying no remorse. The appellant said something “about some criminal cases coming up and he said that [the victim] would not testify against him.” The appellant looked at the picture again, smiled, and said that “if there wasn’t no evidence there wouldn’t be no charges.” Jones told the appellant that he thought a young boy such as the victim might talk to police. The appellant said, “I guarantee that they will not tell on me.” The appellant smiled again and did not say anything further.

Chandra Payne testified that she was the appellant’s girlfriend at the time the victim was killed. In the early morning hours of November 22, 2002, Payne was falling asleep on a couch in Chapman’s living room when the appellant came inside. The appellant approached the couch, got down on his knees, and began crying. Payne sat up on the couch, and the appellant sat next to her. The appellant pulled a silver pistol with an ivory grip out of his pocket. Payne identified the gun found by police in the drainage ditch as the gun the appellant displayed. After showing Payne the gun, the appellant smelled the barrel of the pistol and offered it to Payne to smell. Payne detected the odor of gunpowder. The appellant opened the chamber of the gun and showed Payne that four bullets were missing. The appellant told Payne that he had shot the victim, indicating that he shot him three times in the forehead and once in the throat. The appellant said that the victim was in the woods. The appellant told Payne that he was going to throw the gun away, but he did not say where. Payne recalled a conversation in Chapman’s bedroom wherein the appellant said that the victim wanted to “turn himself in,” and that the appellant “would have to get rid of him.”

Based upon the foregoing evidence, the jury found the appellant guilty of the first degree murder of the victim. On appeal, the appellant raises the following issues for our review: (1) whether the State failed to timely disclose exculpatory information; (2) whether the trial court erred in failing to suppress the appellant’s statements to police due to a Miranda violation; (3) whether the trial court erred in allowing evidence of a burglary to be introduced during the course of the murder trial; and (4) whether the evidence is insufficient to sustain his conviction for murder.

II. Analysis

A. Motion to Suppress Statements

First, we will address the appellant's contention that the trial court erred by failing to suppress statements he made to Detective Caldwell on November 26, 2002, and December 2, 2002, and to Agent McCall on December 8, 2002. The appellant contends that there were Miranda violations regarding all three of his statements.

At the pretrial suppression hearing, Detective Caldwell testified that Apodaca reported the victim missing on November 23, 2002. Detective Caldwell learned of the missing person report on Monday, November 25, 2002. Detective Caldwell determined where the victim was living and ascertained the names of other people staying at that residence. As part of his investigation into the victim's disappearance, Detective Caldwell spoke with the individuals staying at that residence. Detective Caldwell first spoke with the appellant on November 26, 2002. The appellant was in jail on another charge. Detective Caldwell called and asked the appellant if he would meet with the detective for a few minutes. The appellant came to Detective Caldwell's office, and the detective asked if he had any idea of the victim's whereabouts, what might have happened to the victim, and when he last saw the victim. Detective Caldwell did not Mirandize the appellant prior to the conversation, explaining that the appellant was not "a suspect in anything" at that time.

On December 2, 2002, Detective Caldwell again spoke with the appellant. The detective said that the appellant was not a suspect in the murder of the victim; in fact, the victim's body was not discovered until December 7, 2002. Detective Caldwell initiated the conversation at the behest of Newport Police Officer Jimmy Gregg. Officer Gregg asked Detective Caldwell to speak with the appellant to find out if he had any information about the guns the victim stole from Worboys' residence. When Detective Caldwell questioned him, the appellant said that the victim burglarized Worboys' residence, and the appellant went with the victim to sell the guns. The victim sold all of the guns except a handgun which he kept. The appellant was not Mirandized prior to this interview. Detective Caldwell acknowledged that an incident report prepared by police on November 9, 2002, listed the appellant as one of the suspects in the burglary of Worboys' residence. However, Detective Caldwell denied knowing at the time of the interview that the appellant was a suspect in the burglary.

Agent McCall testified at the hearing that he spoke with the appellant at the Cocke County Sheriff's Department in the early morning hours of December 8, 2002. The appellant had been arrested in Grainger County "on an outstanding warrant from Cocke County." Prior to the interview, the appellant signed a waiver of his Miranda rights. Near the end of the interview, the appellant requested an attorney. Agent McCall stated that upon the request, all questioning ceased. Police took some of the appellant's clothing for evidentiary purposes. Agent McCall recalled that as the appellant "was leaving that night to go back [to his cell] he made a statement that he knew who killed [the victim] and he said it was Sean Worboys and he'd take care of it himself." The appellant "made that on his own statement, his own voluntary statement." Agent McCall did not question the appellant after he made that statement.

The trial court found that the appellant's statement that he wanted to go back to his cell was not an indication that he did not want to answer any more questions. The court found that the

appellant did not say anything after he asked for an attorney. Additionally, the court accredited Detective Caldwell's testimony that the appellant was not a suspect in the burglary, and, relying primarily on this finding, the trial court ruled that the appellant's statements to Detective Caldwell were admissible.

The appellant makes two complaints regarding the trial court's decision to admit his statements. The appellant first argues that he was not properly Mirandized before he made statements to Detective Caldwell on November 26, 2002 and December 2, 2002. The appellant's second argument concerns his conversation with Agent McCall on December 8, 2002. Specifically, the appellant contends that Agent McCall was required to re-Mirandize him after he began talking subsequent to his request to return to his cell and be supplied with counsel.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the State, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Odom, 928 S.W.2d at 23. Moreover, we note that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998).

Generally, the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution provide a privilege against self-incrimination to those accused of criminal activity, making an inquiry into the voluntariness of a confession necessary. See State v. Callahan, 979 S.W.2d 577, 581 (Tenn.1998). As our supreme court has explained:

In Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 694 (1966), the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The procedural safeguards must include warnings prior to any custodial questioning that an accused has the right to remain silent, that any statement he makes may be used against him, and that he has the right to an attorney.

State v. Blackstock, 19 S.W.3d 200, 207 (Tenn. 2000). However, Miranda rights may be waived by an accused. Id. Whether a waiver has been voluntarily, knowingly, and intelligently made must be

determined by the totality of the circumstances surrounding the interrogation. State v. Van Tran, 864 S.W.2d 465, 472-73 (Tenn. 1993). The entitlement to Miranda protections is limited to situations involving custodial interrogation or its functional equivalent. Walton, 41 S.W.3d at 82. A trial judge's findings of fact at a motion to suppress hearing are accorded the weight of a jury verdict. See State v. Tate, 615 S.W.2d 161, 162 (Tenn. Crim. App. 1981). Accordingly, the trial court's decision is binding upon this court if the decision is supported by a preponderance of the evidence. Odom, 928 S.W.2d at 22-23.

In determining whether a suspect is in custody for Miranda purposes, we must consider “whether, under the totality of the circumstances, a reasonable person in the suspect’s position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest.” State v. Anderson, 937 S.W.2d 851, 855 (Tenn. 1996). Certain factors are relevant to our inquiry, including but not limited to the following:

the time and location of the interrogation; the duration and character of the questioning; the officer’s tone of voice and general demeanor; the suspect’s method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect’s verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer’s suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will.

Id. The analysis is very fact-specific. Id. Further, whether a suspect is in custody is determined by an objective test. State v. Bush, 942 S.W.2d 489, 499 (Tenn. 1997).

The proof at the suppression hearing reflects that at the time of the November 26, 2002, statement, the appellant was in jail “on another charge.” However, the appellant being in custody on other charges does not automatically trigger the “in custody” portion of the Miranda requirement. State v. Goss, 995 S.W.2d 617, 629 (Tenn. Crim. App. 1998). Detective Caldwell testified that he asked the appellant to come to his office to answer some questions, and the appellant complied. The appellant came to the office to answer questions about the victim’s whereabouts. Detective Caldwell’s testimony indicates that he came there of his own accord. We conclude, based upon the record before us, that the appellant was not “in custody” for Miranda purposes at the time of the November 26, 2002, interview. Accordingly, the trial court did not err in allowing the appellant’s November 26, 2002, statement to be admitted into evidence.

Turning to the appellant’s December 2, 2002, statement, we note that the trial court was presented with few facts concerning the circumstances surrounding the taking of that statement. The

record indicates that Detective Caldwell and Officer Jimmy Gregg were in Detective Caldwell's office when the statement was taken. The trial court focused on the fact that the appellant was not a suspect at the time of the interview. However, because the test for determining when a suspect is in custody for Miranda purposes is an objective one, the "undisclosed knowledge or suspicions of law enforcement officials are irrelevant to the question of whether a reasonable person in the position of [a suspect] would . . . consider[] himself deprived of freedom of movement to a degree associated with a formal arrest." Bush, 942 S.W.2d at 499. Accordingly, we conclude that the facts presented were simply inadequate for trial court to determine whether Miranda warnings were required during the December 2, 2002, interview. Regardless, our review of the record reveals that the December 2, 2002, statement is cumulative to the November 26, 2002, statement, rendering the error harmless. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b).

Concerning the appellant's challenge to the admissibility of his December 8, 2002, statement to Agent McCall, we note that Agent McCall testified that the appellant was apprised of his Miranda rights prior to the interview. At one point in the interview, the appellant stated that he wanted to go to his cell, explaining that he "was tired of answering questions about the burglary he did not commit." Police continued to question the appellant, and, ultimately the appellant requested an attorney. At the suppression hearing, Agent McCall said that after the appellant requested an attorney, the agent told the appellant that they needed to keep some of the appellant's clothes for evidence. While police were obtaining the clothing, the appellant remarked that he knew that Sean Worboys had killed the victim.

The appellant's entire argument on this issue on appeal is as follows:

Under Miranda and its progeny, when a suspect makes a request to speak to an attorney, then the interviewer shall stop questioning the suspect and allow the attorney to be present. Likewise, under the 5th Amendment and the 6th Amendment, a person has the right to remain silent and the right to an attorney.

In the present case, TBI Special Agent McCall violated Miranda and the 6th Amendment when speaking to the appellant. Appellant had talked with the Agent for a while then stated he wanted to go back to his cell and asked for an attorney. . . . The agent then requested part of Appellant's clothing to be removed and stated that Appellant started talking again "out of the blue" and that the agent did not re-Mirandize him.

The appellant's amorphous arguments indicate a complaint regarding the admissibility of statements made after the appellant requested to return to his cell, as well as a complaint regarding

the admissibility of statements made after the appellant asked for an attorney.¹ Initially, we note that the statements the appellant made after he requested an attorney were not admitted at trial. The appellant's statement, by the agreement of the parties, was redacted, and the appellant's comment that he knew that Sean Worboys had killed the victim was not admitted at trial. Therefore, we conclude that any complaint to the admissibility of statements made after the appellant requested an attorney is moot.

Next, we will turn to the admissibility of the statements made after the appellant requested to return to his cell. Our supreme court has concluded that after an individual has been advised of his or her Miranda rights, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." State v. Crump, 834 S.W.2d 265, 269 (Tenn. 1992)(quoting Miranda, 384 U.S. at 473-74, 86 S. Ct. at 1627). In the instant case, the appellant told police that he wanted to go to his cell and that he was tired of answering questions regarding a burglary he did not commit. The trial court found that the appellant's remarks did not indicate a desire to remain silent. However, we conclude that these remarks were clearly an invocation of the appellant's right to remain silent; therefore, police were obligated to cease questioning the appellant so that the appellant's right to remain silent would be "scrupulously honor[ed]." Id. Therefore, we conclude that the State should not have been allowed to present to the jury, through introduction of the written statement or through Agent McCall's testimony, that the appellant had no reaction when he was told the victim was dead or that the appellant acknowledged he pawned the camcorder from the Worboys' robbery. However, in light of the remaining evidence presented at trial and the largely cumulative nature of the statement, we conclude that this error was harmless.

B. Rule 404(b)

The appellant next contends that the trial court "erred in allowing evidence of the burglary case during the murder trial." The appellant claims that the evidence that the victim and the appellant committed the Worboys' burglary should not have been admitted at the murder trial because it did not meet the test for admittance under Tennessee Rule of Evidence 404(b).

Prior to trial, the appellant filed a motion seeking to exclude from trial any evidence relating to his role in the burglary of the Worboys' residence. The appellant argued that he would be unduly prejudiced if the jury learned of his burglary of the Worboys' residence and that Tennessee Rule of Evidence 404(b) bars the admission of the prior acts evidence. The State maintained that evidence of the burglary was admissible to explain how the murder weapon was obtained and the appellant's motive for killing the victim. The State explained that Worboys would testify regarding the burglary,

¹ We note in his brief the appellant asserts, "As a matter of well settled case law, these statements should have been suppressed." However, the only "well-settled case law" the appellant saw fit to provide this court was a citation to Miranda. We caution appellate counsel to provide the necessary law and citation to support the position advocated or risk this court making an adverse ruling or considering the issue waived. See Tenn. Ct. Crim. App. R. 10(b); Tenn. R. App. P. 27(a)(7).

the State would present evidence of a police report regarding the burglary, and the State had a pawn shop receipt evidencing that the appellant had pawned a camcorder obtained during the robbery.

The trial court found that there was clear and convincing proof of the robbery. The court noted that the evidence of the burglary was relevant to material issues in the murder trial. The court specifically stated that the evidence related “to all of these items that have been listed [in Rule 404(b)]. The one I think that particularly got my attention though was the existence of a larger continuing plan. But his evidence does go to motive, it can address intent and of course ‘I did it’ you know, which is definitely a material issue.” The court acknowledged that the evidence was prejudicial but noted that almost all of the evidence against a defendant is prejudicial. However, the court found that its probative value outweighed its prejudicial effect. On appeal, the appellant challenges this ruling.

Initially, we note that Tennessee Rule of Evidence 404 provides:

(b) Other Crimes, Wrongs, or Acts. - Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

(1) The court upon request must hold a hearing outside the jury’s presence;

(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

(3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and

(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

See also State v. Parton, 694 S.W.2d 299, 302 (Tenn. 1985). A trial court’s decision regarding the admission of Rule 404(b) evidence will be reviewed under an abuse of discretion standard; however, “the decision of the trial court should be afforded no deference unless there has been substantial compliance with the procedural requirements of the Rule.” State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997).

Generally, “[o]nly in an exceptional case will another crime, wrong, or bad act be relevant to an issue other than the accused’s character. Such exceptional cases include identity, intent,

motive, opportunity, or rebuttal of mistake or accident.” State v. Luellen, 867 S.W.2d 736, 740 (Tenn. Crim. App. 1992). In making its decision regarding the admissibility of the testimony, the trial court must first determine if the offered testimony is relevant to prove something other than the appellant’s character. This court has previously concluded, “The relations existing between the victim and the defendant prior to the commission of the crime are relevant. These relations indicate hostility toward the victim and a settled purpose to harm or injure [the victim].” State v. Glebock, 616 S.W.2d 897, 905-06 (Tenn. Crim. App. 1981).

In ruling on the issue, the trial court found that Worboys’ testimony that the burglary occurred, the pawn shop receipt evidencing that the appellant pawned a camcorder from the burglary, and “an official report” constituted clear and convincing proof that the burglary occurred. The evidence does not preponderate against this finding.

The appellant complains that the trial court erred in admitting the evidence to establish motive, arguing that motive is not an element of first degree murder. We note that motive is ordinarily not an element of a crime. Nevertheless, Rule 404(b) has carved an exception for the admission of prior acts evidence to establish motive if such is a material issue in a case. See State v. Charles Edwin Lamb, No. 03C01-9701-CR-00010, 1998 WL 103316, at *9 (Tenn. Crim. App. at Knoxville, Feb. 20, 1998). In the instant case, the appellant was charged with the premeditated murder of the victim. Premeditation “is an act done after the exercise of reflection and judgment” and “means that the intent to kill must have been formed prior to the act itself. [However,] [i]t is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time.” Tenn. Code Ann. § 39-13-202(d) (2003). Accordingly, the State was required to prove that the appellant reflected upon the murder of the victim. The appellant’s motive to kill the victim serves to prove that the killing was a premeditated act. See State v. Leach, 148 S.W.3d 42, 54 (Tenn. 2004); State v. G’Dongalay Parlo Berry, No. M1999-00824-CCA-R3-CD, 2001 WL 1251240, at *11 (Tenn. Crim. App. at Nashville, Oct. 19, 2001). The State’s theory at trial was that the appellant killed the victim to prevent the victim from disclosing the appellant’s involvement in the Worboys’ burglary. Thus, the appellant’s intent and motive were rooted in the evidence of the burglary. Accordingly, we conclude that the trial court did not err in ruling the evidence admissible.

C. Brady/Rule 16 Violation

The appellant’s next issue concerns the State’s delayed disclosure of statements by Patti Rogers and Sean Worboys. Near the end of the first day of trial, the State provided the appellant copies of the statements of Rogers and Worboys who were scheduled to testify on the second day. After reviewing the statements, the appellant discovered that Rogers had told police that Worboys “threatened to “blow [the victim’s] brains out because the victim had been involved in the burglary of Worboys’ residence.” Rogers also disclosed that Worboys said the victim “got what he deserved.” Worboys admitted in his statement that he had threatened to hurt the victim if he found him.

The contested statements were disclosed to the appellant as Jencks material on the first day of trial; Worboys and Rogers testified on the second day of trial. Before trial actively commenced

on the second day, the appellant made a motion for a mistrial due to a Brady violation. During his argument on the motion, the appellant alleged that the Rogers' and Worboys' statements were exculpatory materials which should have been disclosed prior to trial after the appellant filed a discovery/Brady motion. The appellant contended that he could have conducted further investigation regarding Worboys if he had been provided the statements prior to trial.

The State acknowledged that the materials "appear to be exculpatory." The State admitted, "It's my fault I messed up. I didn't see that. . . . But I did furnish it to the [appellant] yesterday." The State contended that the State merely delayed disclosure and did not completely fail to disclose the statements, arguing that the appellant suffered no prejudice as a result of the delayed disclosure.

The trial court agreed that the statements "should have been furnished sometime ago." However, the court noted that the materials were furnished during trial, which "would generally pretty well cure the error unless it's put you in some terrible position." The court stated that because Worboys and Rogers had not yet testified, the appellant could cross-examine the witnesses about their statements. Therefore, the court determined that the appellant suffered no prejudice by the delayed disclosure. Additionally, at the motion for new trial hearing, the appellant acknowledged that his counsel and his investigator were allowed to interview Worboys prior to his testimony and that Worboys testified the next day. The court observed, "[W]e don't have anything in front of us, other than the conclusory statement that [having the statement earlier] could have helped or things could have been different." Thus, the court found that "if there was error, . . . it's been cured. Or maybe you could say it was harmless error." On appeal, the appellant contests the trial court's failure to grant a mistrial due to the State's delayed disclosure of the Rogers' and Worboys' statements.

Initially, we note that a mistrial should be declared in criminal cases only in the event that a manifest necessity requires such action. State v. Millbrooks, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). In other words, a mistrial is an appropriate remedy when a trial cannot continue or a miscarriage of justice would result if it did. State v. McPherson, 882 S.W.2d 365, 370 (Tenn. Crim. App. 1994). The decision to grant a mistrial lies within the sound discretion of the trial court, and this court will not interfere with the exercise of that discretion absent clear abuse appearing on the face of the record. See State v. Hall, 976 S.W.2d 121, 147 (Tenn. 1998). Moreover, the burden of establishing the necessity for mistrial lies with the party seeking it. State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

The United States Supreme Court held in Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963), that the State has a constitutional duty to furnish an accused with exculpatory evidence pertaining to the accused's guilt or innocence or to the potential punishment faced by the accused. Specifically, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87, 83 S. Ct. at 1196-97. The State's duty to disclose exculpatory evidence extends to evidence which may be used by the accused for impeachment purposes. Giglio v. United States, 405 U.S. 150, 154-55, 92 S. Ct. 763, 766 (1972).

The appellant bears the burden of proving a Brady violation by a preponderance of the evidence. State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995). In order to prove that a Brady violation exists, the appellant must show that: (1) the appellant requested the information (unless the evidence is obviously exculpatory, in which case the State is obligated to release such evidence regardless of whether or not it was requested); (2) the State suppressed the information; (3) the information was favorable to the appellant; and (4) the information was material. Id.

Unquestionably, the State disclosed the statements of Rogers and Worboys on the first day of trial. Accordingly, the issue before this court concerns a delayed disclosure of evidence, not a complete nondisclosure of evidence. This court must analyze a delayed disclosure of evidence differently than a complete nondisclosure of evidence. Indeed, when there has been a delayed disclosure of evidence, as opposed to a complete nondisclosure, Brady is normally inapplicable unless the delay itself causes prejudice. See State v. Caughron, 855 S.W.2d 526, 548 (Tenn.1993); State v. Joan Elizabeth Hall, No. 01C01-9710-CC-00503, 1999 WL 34782, at *9 (Tenn. Crim. App. at Nashville, Jan. 28, 1999). When there has been a delayed disclosure, as opposed to a nondisclosure, the appellant must establish that the delayed disclosure prevented him from using the disclosed material effectively in preparing and presenting his case. Caughron, 855 S.W.2d at 548. Moreover, if the appellant failed to move for a continuance after receiving the information, thoroughly cross-examined the witness(es) regarding the evidence, or failed to call or recall an available witness concerning the exculpatory statements, the potential Brady violation may be cured. Id.

In the instant case, the appellant thoroughly cross-examined Worboys regarding his threats toward the victim. The appellant also cross-examined Rogers regarding Worboys threatening the victim. The appellant maintains that had he been provided the statements earlier, he could have further investigated the matter. However, the appellant has provided no evidence as to what further investigation would have revealed. Accordingly, the appellant has failed to demonstrate that he was prejudiced by the State's delayed disclosure. We conclude that the trial court did not err in failing to grant a mistrial based upon the State's delayed disclosure of the statements.

D. Sufficiency of the Evidence

Finally, the appellant asserts that the evidence is not sufficient to sustain his conviction for first degree murder. On appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the

weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990).

In order to obtain the appellant's conviction for first degree premeditated murder, the State was required to prove, beyond a reasonable doubt, that the appellant committed the "premeditated and intentional killing of [the victim]." Tenn. Code Ann. § 39-13-202(a)(1) (2003). Premeditation "is an act done after the exercise of reflection and judgment" and "means that the intent to kill must have been formed prior to the act itself. [However,] [i]t is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time." Id. at (d). Although there is no concrete test for determining the existence of premeditation, Tennessee courts have relied upon certain circumstances to infer premeditation. See State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998). Specifically, the following factors have been used to support a jury's inference of premeditation: (1) the appellant's prior relationship to the victim which might suggest a motive for the killing; (2) the appellant's declarations of intent to kill; (3) the appellant's planning activities before the killing; (4) the manner of the killing, including the appellant's using a deadly weapon upon an unarmed victim, killing the victim while the victim is retreating or attempting escape, or killing the victim in a particularly cruel manner; (5) the appellant's demeanor before and after the killing, including a calm demeanor immediately after the killing. See Pike, 978 S.W.2d at 914-915; State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997).

In the instant case, the State's proof at trial revealed that the appellant and the victim were involved in the burglary of Worboys' residence. Thereafter, the victim expressed a desire to turn himself in to the authorities. The appellant told several individuals that he needed to get rid of the victim before the victim revealed the details of the burglary. The victim disappeared, and the appellant appeared unconcerned about the victim's disappearance. After seeing the victim's picture in a newspaper article concerning his disappearance, the appellant told Herndon and Jones that "if there wasn't no evidence there wouldn't be no charges." The appellant told his girlfriend Chandra Payne that he shot the victim four times in the head, pointing to his head and throat. Payne testified that she smelled the gun the appellant had used in the murder, and the gun smelled of gunpowder. The appellant told Payne that he intended to dispose of the gun. The appellant also told Mayes that he had killed the victim to cover up his complicity in the burglary, again pointing to his head to demonstrate where the bullets struck the victim. The victim was found shot four times in the head, consistent with the appellant's statements to various individuals. The appellant told Mayes that he put the gun in a drain pipe. The police later discovered in a drain pipe a handgun stolen during the Worboys' robbery, and the gun was consistent with the weapon that killed the victim. The bullets recovered from the victim were consistent with those that had been in the gun when it was stolen. Accordingly, we conclude that the proof is sufficient to sustain the appellant's conviction.

III. Conclusion

Finding no reversible error, we affirm the judgment of the trial court.

NORMA McGEE OGLE, JUDGE